payable to the defendant as a member of the legislative assembly. The written authority was a valuable security which ensured payment to the plaintiff of a sum of $500 *per mensem* by a third party.

The doctrine first stated by the Court of Common Pleas in *Pinnel's* case,[4] that "payment of a lesser sum in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum" was affirmed and followed by the House of Lords in *Foakes* v. *Beer*.[5] But the Lord Chancellor, the Earl of Selbrone, in his speech distinguished very clearly the case before him from those cases where the giving of a negotiable paper or something other than a mere money payment constituted new consideration. His Lordship observed:

"All the authorities subsequent to *Cumber* v. *Wane* (1 Sm. L.C. 8th ed. 366), which were relied upon by the appellant at your Lordship's Bar (such as *Sibree* v. *Tripp* (15 M. & W. 23)), *Curlewis* v. *Clark* (3 Ex. 375), have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber* v. *Wane*, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal...."

In my view the letter authorising the clerk of the legislative assembly to pay to the plaintiff's solicitors the sum of $500 *per mensem* was an independent benefit of the kind envisaged by the Lord Chancellor in *Foakes* v. *Beer*. That letter was in law capable of being a good and valuable consideration.

Counsel for the plaintiff submits that the letter was not valuable consideration because the defendant could have cancelled that letter at any time and stopped payment of the allowance of $500 *per mensem*. In my view there is no substance in this submission. First, the fact is that the defendant did not cancel the letter. Secondly, it is settled law that a debt may be discharged by the acceptance of a cheque for a smaller amount although the drawer of the cheque can and may stop payment on the cheque. For these reasons I hold that the agreement in February 1963 to vary the terms of the separation deed was a valid one and enforceable at law.

There is no evidence before the court that the financial circumstances of the defendant have changed for the better after February 1963 and that he has been since then in a position to pay $850 *per mensem* as provided in the separation deed. The plaintiff is therefore not entitled to recover the sum of $5,141.24 which she alleges is due to her under the original terms of the deed. The plaintiff's alternative claim is for $466.67, being the balance for September 1963. She is entitled to recover this sum. Accordingly there will be judgment for the plaintiff in the sum of $466.67.

Judgment for the plaintiff.

Solicitors: *Donaldson & Burkinshaw; L. Rayner.*

RE LEE GEE CHONG DECEASED; TAY GEOK YAP & ORS. v. TAN LIAN CHEOW

[F.C. (Wee Chong Jin C.J. (Singapore), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) October 19, 1964]

Husband and Wife — Chinese Customary Law — Marriage — Legal requirements for marriage with a t'sip — Consensual marriage — Proof of performance or celebration in accordance with Chinese customs and rites unnecessary — Chinese divorce.

Precedent — Decision of Singapore Court of Appeal — Whether binding on Federal Court — Whether decision given per incuriam — Malaysia Act 1963, s. 88(3).

Costs — Trustees seeking second opinion — Exceptional circumstances.

The deceased, a Chinese, died intestate on or about April 25, 1960, domiciled in Singapore. The principal wife, Tay Geok Yap, filed a petition for letters of administration of the deceased's estate and against this petition, Ng Yin Yeok filed a caveat claiming an interest in the estate as lawful widow of the deceased. A deed of agreement was subsequently entered into between the principal wife and Ng Yin Yeok and on the February 20, 1961, the court ordered that the deed of agreement be approved and that letters of administration be granted to Tay Geok Yap and Lee Boon Leong, the deceased's son by her. On October 13, 1961, the respondent, Tan Lian Cheow, claiming to be one of the lawful widows of the deceased filed a notice of motion for revocation of the grant. The matter was ordered to proceed as an action and Ambrose J. held:

(a) to prove a Chinese secondary marriage it is only necessary to prove a common intention to form a permanent union as husband and secondary wife and the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband;

(b) in this case the evidence showed that the deceased and Tan Lian Cheow intended to form a permanent union as husband and secondary wife and that they formed the union in accordance with their intention on December 19, 1957;

(c) the law of Singapore is that a Chinese secondary marriage could be dissolved by the husband by unilaterally repudiating his secondary wife, if she has been disobedient to him or to his principal wife or has been guilty of immoral conduct, and by notifying the dissolution to his near relatives or his clansmen;

(d) in this case the deceased had no grounds for

divorcing Tan Lian Cheow and he did not in fact divorce her.

The questions of law raised on appeal were whether (i) the trial judge was wrong in law in regard to what must be proved to establish a Chinese secondary marriage; (ii) the Singapore Court of Appeal wrongly interpreted the law in their decision in *Re Lee Siew Kow deceased* (7) which could not stand with the Privy Council case of *Khoo Hooi Leong* v. *Khoo Chong Yeok.*(13)

Held: (1) the trial judge correctly set out the law to be applied to the case; and there was ample evidence on which he could reach the conclusion which he did;

(2) by virtue of section 88(3) of the Malaysia Act the Federal Court must be regarded as being one and the same as the former Singapore Court of Appeal and the decision in *Lee Siew Kow's* (7) case is binding on the court unless applying the principles in *Young* v. *Bristol Aeroplane Co. Ltd.*(12) it can be shown that (a) the decision though not expressly overruled, cannot, in the opinion of the court stand with a decision of the Privy Council or (b) the decision was given *per incuriam* in that it acted in ignorance of a decision of the Privy Council which would have affected its decision had its attention been so drawn. In this case there was nothing in the judgment in *Khoo Hooi Leong* v. *Khoo Chong Yeok* which was inconsistent with the *Lee Siew Kow* case and the decision in the latter case was not given *per incuriam;*

(3) unless it can be shown that there are exceptional circumstances for a trustee or trustees to seek a second opinion from the courts, where litigation is concerned, the unsuccessful appellant must pay the costs, i.e., the usual consequences will follow from an unsuccessful appeal.

Cases referred to:—

(1) *Cheang Thye Pin* v. *Tan Ah Loy* [1920] A.C. 369.

(2) *Re Lee Choon Guan, deceased* [1935] M.L.J. 78.

(3) *Re Tay Geok Teat, deceased; Sunny Tay* v. *Seow See Neo* [1934] M.L.J. 83.

(4) *Ngai Lau Shia* v. *Low Chee Neo* (1915), 14 S.S.L.R. 35.

(5) *Cheang Thye Pin* v. *Tan Ah Loy* (1916), 14 S.S.L.R. 79.

(6) *Re Yeow Kian Kee, deceased; Er Gek Cheng* v. *Ho Ying Seng* [1949] M.L.J. 171.

(7) *Re Lee Siew Kow deceased* [1952] M.L.J. 184.

(8) *Re Choo Eng Choon, deceased (Six Widows' Case)* (1908) 12 S.S.L.R. 120.

(9) *Woon Ngee Yew* v. *Ng Yoon Thai* [1941] M.L.J. 82.

(10) *Re Sim Siew Guan, deceased* [1932] M.L.J. 95.

(11) *R.* v. *Willans* (1859), 3 Ky. 16.

(12) *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] 1 K.B. 718.

(13) *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] A.C. 346.

(14) *Moore* v. *Hewall* [1947] 2 All E.R. 270.

(15) *R.* v. *Northumberland & Compensation Appeal Tribunal* [1951] 1 All E.R. 268.

(16) *Re Ho Khian Chong* [1963] M.L.J. 316.

FEDERAL COURT.

M. B. Brash and *M. Karthigesu* for the appellants.

J. F. McWilliams and *Tan Teck Chuan* for the respondent.

In the court below the following judgment was delivered by —

Ambrose J.: The issue in this probate action was whether the plaintiff, Tan Lian Cheow, is one of the lawful widows of Lee Gee Chong, deceased.

The history of the litigation is as follows. Lee Gee Chong died intestate on or about the 25th April, 1960, domiciled in Singapore. His principal wife, Tay Geok Yap, filed a petition for letters of administration of the deceased's estate on the 17th May, 1960. Against this petition a caveat was filed by Ng Yin Yeok claiming an interest in the estate as a lawful widow of the deceased and as lawful guardian of her three children by him. On the 30th September, 1960, it was ordered that pleadings be delivered and the matter proceed as an action between Tay Geok Yap as plaintiff and Ng Yin Yeok as defendant. By a deed of agreement dated the 13th February, 1961, provision was made for the compromise of the proceedings and of the claims of Ng Yin Yeok and her three children against the deceased's estate. On the 20th February, 1961, the court ordered that the deed of agreement be approved and that letters of administration be granted to Tay Geok Yap and Lee Boon Leong, the deceased's son by her.

On the 13th October, 1961, Tan Lian Cheow, claiming to be one of the lawful widows of the deceased, filed a notice of motion for revocation of the grant. The application was heard on the 23rd October, 1961, when the court ordered that the above issue be tried, that pleadings be delivered, and that the matter proceed as an action between Tan Lian Cheow as plaintiff and Tay Geok Yap and Lee Boon Leong as first defendants and Ng Yin Yeok as second defendant.

The first question raised by the issue in the action was a question of law: what had to be proved to prove a Chinese secondary marriage? It was held by the Privy Council in *Cheang Thye Pin* v. *Tan Ah Loy,*(1) that, although some sort of ceremony is usual when a secondary wife is taken, a ceremony is not essential to constitute a secondary wife. The judgment of the Privy Council was delivered by Viscount Finlay, who said at page 376:

> "All the judges of the appeal court held that a ceremony, though usual, was not essential to constitute a secondary wife. The view taken by them on this point is entirely consistent with the *Six Widows' Case,* 12 S.S.L.R. 120, 209, and with the view of the majority of the Court of Appeal in *Ngai Lau Shia* v. *Low Chee Neo* decided at Singapore in January, 1916, and reported in an appendix to the record in the present case (subsequently reported in 14 S.S.L.R. 35). Their Lordships see no ground for differing from the conclusion arrived at upon this point in the court below".

Counsel for the defendants contended that it was necessary to prove three elements to prove a Chinese secondary marriage:

(1) long continued cohabitation;

(2) a common intention to form a permanent union as husband and secondary wife;

(3) reputation of marriage, of which recognition by the alleged husband's family is the most usual and strongest evidence.

Counsel relied on the judgment of Terrell J. in *Re Lee Choon Guan, deceased.*[2] In that case the learned judge referred to his own judgment in *Re Tay Geok Teat, deceased*; *Sunny Tay* v. *Seow See Neo,*[3] and said that there he reviewed the authorities and extracted from them an indication that, in cases where it is sought to establish a Chinese secondary marriage, the evidence must establish an intention to effect a permanent union, and that there must be satisfactory evidence of the recognition of the marriage. In *Re Lee Choon Guan, deceased,* Terrell J. while dealing with the evidence as to reputation of marriage and recognition, referred to the evidence given by Dr. Tyau, the Consul-General for China, as to the custom in China as regards recognition. Dr. Tyau's evidence, which the learned judge apparently took into consideration, was to this effect:

> "If she (i.e. the plaintiff) was kept without the knowledge of the family, (i.e. of the alleged husband) she would not be a concubine (i.e. secondary wife)".

The learned judge appears to have erred in assuming that customs observed among Chinese families living in China were observed among Chinese families living in the Straits Settlements. If Terrell J. took the view that under the law of the Straits Settlements a woman who claims to be the secondary wife of a man has to prove recognition of the alleged secondary marriage by the man's family, I must say, with the greatest respect to the learned judge, that, in my opinion, that view is erroneous. I do not think that that view has been followed in any other case. Even in the case of *Re Lee Choon Guan, deceased,* it is important to note that counsel for the 5th defendant did not go so far as to submit that recognition of the alleged secondary marriage by the alleged husband's family is an essential element for establishing a Chinese secondary marriage; he merely submitted that it is the most usual and strongest evidence of reputation of marriage. And the contention of counsel for the defendants in the case before me is identical with the submission of counsel in the case before Terrell J.

I must now deal with the contention of counsel for the defendants. It is clear that to constitute a Chinese secondary marriage there must be a common intention to form a permanent union as husband and secondary wife. But, in my opinion, long continued cohabitation and reputation of marriage are not essential for constituting a secondary marriage. I would go further and say that these two elements are not essential for proving a secondary marriage. All that can be said is that the court will, upon proper evidence, presume a secondary marriage from cohabitation and repute. That was the principle followed by the Court of Appeal in *Ngai Lau Shia* v. *Low Chee Neo,*[4] and also in *Cheang Thye Pin* v. *Tan Ah Loy,*[5] and the Privy Council in *Cheang Thye Pin* v. *Tan Ah Loy.*[1]

Counsel for the plaintiff submitted that the law of Singapore merely requires a consensual marriage for the acquisition of the status of a secondary wife. He relied on *Re Yeow Kian Kee, deceased; Er Gek Cheng* v. *Ho Ying Seng,*[6] where Murray-Aynsley C.J. said:

> "The legal requirements for marriage with a *t'sai* (principal wife) or a *t'sip* (secondary wife) are, I think, the same. This means that the law of this Colony (Singapore) merely requires a consensual marriage".
>
> . . . . . .
>
> "With these simple legal requirements the difficulties that have troubled the courts have been merely questions of evidence. The burden of proof is upon whoever alleges the status of *t'sip* to have existed. What must be proved in order to discharge that burden? In most cases there is some sort of a ceremony, and there is recognition of the *t'sip* as a member of the husband's family. But this is evidentiary only. It is not essential to the acquisition of the status of *t'sip.*
>
> A formal contract in writing would be conclusive. If the parties were to live as such publicly so as to acquire the reputation of being man and *t'sip* that would also be evidence that the status had been acquired. On the other hand, I do not consider that mere cohabitation for a considerable period would by itself be sufficient evidence".

Counsel for the plaintiff also relied on *Re Lee Siew Kow deceased.*[7] There the Singapore Court of Appeal consisting of Murray-Aynsley C.J., Mathew C.J. (Federation of Malaya) and Brown J. accepted the above exposition of the law. Mathew C.J. said:

> "the learned Chief Justice has set out with great clarity the law of the Colony (Singapore) on the subject of the acquisition of the status of a *t'sip* or secondary wife, and has removed certain obscurities which clouded earlier decisions. He has laid down that for the legal requirements of a marriage with a *t'sip* the law of the Colony merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *t'sip.* With this exposition of the law I am in complete agreement".

It is to be stressed that Murray-Aynsley C.J. said in *Re Yeow Kian Kee deceased,* that recognition of the *t'sip* as a member of the husband's family is not essential to acquisition of the status of a *t'sip.* He said (at page 174):

> "In these circumstances, is there enough evidence

for me to assume that the deceased had given the plaintiff the status of a *t'sip*? I think that it is certain that he could have done so, even if he kept the relationship a secret".

It is also to be stressed that Mathew C.J. said in *Re Lee Siew Kow deceased*, that he was in complete agreement with the exposition of the law by Murray-Aynsley C.J. in *Re Yeow Kian Kee deceased*. It must be added that Brown J. stated in *Re Lee Siew Kow deceased*:

"the absence of such recognition (that is by the alleged husband's principal wife and family) does not of necessity disprove the marriage. A clandestine marriage which is unknown to the family is legally possible, though it may be hard to prove".

On the authorities cited by counsel for the plaintiff, the conclusion I came to as regards the question what had to be proved to prove a Chinese secondary marriage was this: it is only necessary to prove (1) a common intention to form a permanent union as husband and secondary wife and (2) the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband.

The second question I had to consider was a question of fact: did the plaintiff, Tan Lian Cheow, become a secondary wife of Lee Gee Chong? The plaintiff started to work as a waitress in a restaurant in the New World Park in 1950. She was then 16 years old. Lee Gee Chong, whom I will call Lee, used to dine at the restaurant from time to time with his maternal uncle, Lim Joo Him, whom I will call Lim, and some of his friends. The plaintiff used to wait upon them. Lee was attracted by her and, according to his friend, Gan Siong Hiok, was impressed by her obedience and honesty. In or about 1954 the plaintiff left the restaurant to work as a waitress in a coffee-shop in the New World Park, which was subsequently frequented by Lee accompanied by Lim and Lee's friends.

In 1957, Lee told Lim to ask the plaintiff's mother, Siah Swee Eng, whether she would let the plaintiff marry Lee as his third wife. Lim did so. She said that Lim was joking. Lee then asked Lim to arrange a meeting with the plaintiff's mother at a restaurant in Orchard Road. The meeting was arranged and took place in August or September, 1957.

At that meeting Lee asked her if she had made up her mind regarding the marriage proposed by Lim. She told Lee that as he already had two wives he must have courage to marry her daughter. He told her not to worry about his two wives, and said that he would buy a house for her daughter where she could live separately from them. She said she would have to discuss the matter with her daughter. She did so subsequently and her daughter said she would be happy to marry Lee.

Two or three days later, the plaintiff's mother went with Lim to the same restaurant and met Lee. She accepted Lee's proposal. Lee asked her how much she wanted for dowry. She left it to him and he fixed it at $3,000. She said that he must buy a house for her daughter, and he agreed to do so. He gave her $200 to buy sweets for the plaintiff and also to get an astrologer to cast a horoscope to find auspicious dates for the betrothal and the marriage. She asked him for the date of his birth. He said that was 47 years old and that he was born in the year of the pig.

A horoscope was subsequently cast. This fixed the 22nd and 28th days of the 10th moon as auspicious dates for the betrothal and marriage respectively.

The 22nd day of the 10th moon was the 13th December, 1957. On that day Lim went to the plaintiff's mother's house at 101 Syed Alwi Road, taking betrothal gifts from Lee consisting of two pairs of wedding candles and a diamond ring worth $1,000, which was specially bought by Lee on the 2nd November, 1957, for the betrothal. Lim also took with him two copies of a Chinese document made on red paper, which Lim, acting on Lee's instructions, had previously got a letter-writer to make from a draft in Chinese which Lee had drawn up. The candles were burned at the family altar as part of the betrothal ceremony. Lim was given cakes, sweets and a ring to be delivered to Lee. Lim left the house, leaving the two copies of the Chinese document to be signed by the plaintiff's father, Tan Tien Hoa, the plaintiff and the plaintiff's paternal uncle, Tan Seng Liew. The two copies were signed by all three of them in the evening. Lim returned at 7 p.m. and took the plaintiff, her mother and her paternal uncle to Lee's house at No. 140-D Ford Avenue off Holland Road. Lee said that after the marriage the plaintiff would live in that house. Both signed copies of the Chinese document were handed to Lee. He returned one, Ex. P. 25, to the plaintiff's mother.

On the 19th December, 1957, which was the 28th day of the 10th moon, the plaintiff and her mother went to the plaintiff's grandmother's house at Loyang. There a marriage ceremony was performed. The plaintiff wore a wedding-gown. Joss-sticks, joss-paper and candles were burned. Fruits and sweets were placed on the family altar. The plaintiff and her mother and grandparents prayed and worshipped before the family altar. There was a marriage feast. The plaintiff and her mother left before the feast and reached 140-D Ford Avenue before noon. Lim received them. Lee came at 1 p.m. and left at 1.30 p.m. with Lim. The plaintiff went with her mother and had a photograph taken of

herself in her wedding-gown. Lee and Lim returned at 6 p.m. The plaintiff's mother who had received $1,000 towards the dowry earlier received four cheques for the balance of $2,000 and returned home in Lee's car. The plaintiff slept with Lee that night.

In my opinion it is clear that the plaintiff intended to form a permanent union with Lee as husband and secondary wife. She testified that she would not have agreed to live with Lee without being married to him. Did Lee intend to form a permanent union with the plaintiff as husband and secondary wife? When he sent Lim to see the plaintiff's mother he instructed Lim to ask her if she would let the plaintiff marry him as his third wife. That was the evidence of Lim and also the evidence of the plaintiff's mother. I saw no reason to disbelieve either of them. When Lee discussed the matter with the plaintiff's mother at their first meeting he asked her if she had made up her mind regarding the marriage proposed by him. At their second meeting when she accepted the proposal Lee asked her how much she wanted for dowry. If he was only intending to make the plaintiff a mere mistress it would have been odd to speak of a dowry. Furthermore, payment by Lee for a horoscope to find auspicious dates for betrothal and marriage suggests to my mind very strongly that Lee was thinking of taking a third wife and not a mere mistress. The Chinese document which was drafted by Lee and handed to Lim with instructions to have it drawn up by a Chinese letter-writer is an important document and throws light on Lee's intention. It reads as follows:

PLEDGE

Maker/s of this pledge, TAN TIEN HOA and SIAH SWEE ENG, have a daughter, TAN LIAN CHEOW, 24 years of age, and hereby willingly accept betrothal money $3,000 for marrying (her) to LEE GEE CHONG as a concubine. Henceforth, all the affairs of TAN LIAN CHEOW will have nothing to do with the parents, and there shall be no interference under pretext. This document is specially made. No demur shall ever be raised.

Maker/s of pledge:	(Signed)	TAN TIEN HOA
Daughter:	(Signed)	TAN LIAN CHEOW
Witness:	(Signed)	TAN SENG LIEW

MADE ON 13TH DAY OF DECEMBER, 1957.

LIVING TOGETHER FOR A HUNDRED YEARS.

This document says that the plaintiff's father and mother willingly accept $3,000 as betrothal money for marrying Tan Lian Cheow to Lee Gee Chong as a concubine. It must be stated here that "concubinage is recognized as a legal institution under Chinese law conferring upon the *t'sip* (i.e. the concubine) a legal status of a permanent nature": *per* Braddell J. in the *Six Widows' Case*,[8] at page 209. That was also the view of Hyndman-Jones C.J. in the same case at page 187. What does the word "concubine" mean in the document? In a monogamous society the word means a woman who cohabits with a man without being his wife, that is, a kept mistress. In a polygamous society, the word means a "secondary wife" having a status inferior to that of a principal wife but superior to that of a mistress who has no status at all. The word "concubine" in the document therefore means a secondary wife. The document shows clearly that it was Lee's intention to form a permanent union with the plaintiff as husband and secondary wife.

It was argued by counsel for the defendants that because Lee did not attend the marriage ceremony he did not intend to form a permanent union with the plaintiff as husband and secondary wife. There is no substance in this argument because the custom in China used to be that the man did not attend the ceremony for taking a secondary wife: see *Cheang Thye Pin* v. *Tan Ah Loy*,[1] at page 375.

It was argued by counsel for the defendants that because Lee did not allow himself to be photographed with the plaintiff on the 19th December, 1957, he did not intend to form a permanent union with the plaintiff as husband and secondary wife. It seemed to me that the true explanation of this was that he was trying to keep his marriage with the plaintiff secret to avoid trouble with his second wife. Lee disclosed his intention to marry a third wife to his servant Lim Kim Song who was also known as Kow Kai shortly before the 19th December, 1957. He was employed at Ford Avenue to look after three terrace houses and three flats. Lee instructed him to spruce up 140-D Ford Avenue and buy furniture as Lee's third wife would be coming to live there.

It was suggested by counsel for the defendants that Lee had some kind of association with the plaintiff even prior to the unilateral marriage ceremony. It seemed to me, whatever that association was, it did not prevent Lee from making the plaintiff his third wife if he wished to do so.

I was satisfied that Lee intended to form a permanent union with the plaintiff as husband and secondary wife; and that Lee and the plaintiff formed the union in accordance with their intention on the 19th December, 1957.

The plaintiff lived at No. 140-D Ford Avenue with a female servant from that day until the 7th moon, 1958. Lee visited her twice or thrice a week after his work and stayed till about 1 or 2 a.m. He gave her $400 per month for household expenses and $500 per month for personal expenses. About a month after the marriage Lee went to Hongkong with his second wife, Ng

Yin Yeok, after making provision for the maintenance of the plaintiff. He returned after two months and resumed his visits.

One day in the 7th moon, 1958, (that is between 15th August and 12th September) Lee's servant, Kow Kia, saw Lee's second wife coming to Ford Avenue about 7 p.m. Lee had told Kow Kia that he married the plaintiff as his third wife without his second wife's knowledge; that if the second wife came to the house there would be a fight; and that he should warn the plaintiff if he should ever see the second wife coming to the house. In accordance with this instruction, Kow Kia warned the plaintiff about the arrival of the second wife. Lee was there and advised the plaintiff to go to Kow Kai's quarters to avoid meeting the second wife. She did so. The second wife entered the plaintiff's house, looked for the plaintiff and left after failing to find her.

The same evening Lee sent the plaintiff to her mother's house fearing further trouble from his second wife. Three or four days later Kow Kia told the plaintiff that Lee had found accommodation for her in Lloyd House at Lloyd Road and wanted her to move into Lloyd House the following day. The plaintiff collected her belongings from the house in Ford Avenue and moved into Lloyd House accordingly. Lee visited her at Lloyd House from time to time and took her to the house in Ford Avenue where she would stay till midnight. Lee would then send her back to Lloyd House.

The second wife came to know that the plaintiff was living in Lloyd House and visited Lloyd House at the end of 1958 when the plaintiff was not in. The second wife visited Lloyd House again subsequently when the plaintiff was in. The plaintiff told Lee about the visit. Lee told her that the second wife wanted the plaintiff to move into the second wife's house. The plaintiff said she would not dare to live with the second wife. Lee advised the plaintiff to live with her mother for the time being. She visited her mother on the 15th day of Chinese New Year, 1959, (that is 22nd February, 1959). When she returned the next day she found that the air-conditioner and other things had been removed in her absence. It seemed to me highly probable that this was done on Lee's instructions under pressure from his second wife. The plaintiff was thus forced to leave Lloyd House to live with her mother.

Lee bought a piece of land in the plaintiff's name at St. Michael's Road on the 9th January, 1958. On the 25th February, 1958, the plaintiff entered into an agreement with the Nan Yang Realty Co. for the construction of a house on the land for the price of $16,800. Lee had provided her with funds for the cost of the land and some of the instalments. When the plaintiff went to live with her mother she received demands for payment of further instalments. Lee also failed to pay maintenance for a month. So the plaintiff and her mother went to see Lee at his biscuit factory. Lee told her mother that it was a place of business and if she had anything to say she could send Lim Joo Him to see him. Then the plaintiff's mother got in touch with Lim and he told the plaintiff that Lee had said that his second wife wanted the plaintiff to live with her. The plaintiff told Lim that she would not dare to live with the second wife. The plaintiff then went to the Legal Aid Department on the 17th March, 1959, where she was told she was not entitled to legal aid.

Gan Siong Hiok, who was one of Lee's close friends, came to hear about the plaintiff's visit to the Legal Aid Department, and feeling sorry for Lee went to see him about it. Lee told him that he had married the plaintiff and that the reason why he did not let his friends know about the marriage was that he wanted to keep it a secret from his first and second wives. Lee also said that the plaintiff and her mother had come to his biscuit factory and that their visit to the factory made him very angry because it gave publicity to his secret marriage with the plaintiff. Lee added that the plaintiff could not stay at Lloyd House as the second wife had come to know that she was staying there and that he advised her to stay with her mother for the time being. Lee did not say that he had cast off the plaintiff.

Shortly afterwards the plaintiff was invited by Lee through his relative Sze Koh to see Lee at the Southern Restaurant. The plaintiff met Lee there. He said that his second wife had come to know about the house in St. Michael's Road and that she could not live in that house. He advised her to mortgage the house to a bank. He told her that he had purchased a house in Johore Bahru for his second wife and that he would get another house for her after the second wife had moved to Johore Bahru. He advised her to be patient and live with her mother for the time being. He gave her $400 for maintenance on that day. She took Lee's advice and subsequently mortgaged the house to a bank to pay the amount claimed by Nan Yang Realty Co.

It was suggested by counsel for the defendants that Lee's failure to pay the balance of the purchase price of the house clearly indicated that he had no intention to form a permanent union with the plaintiff as husband and secondary wife. In view of the evidence to the contrary, I was unable to accept counsel's suggestion. I formed the opinion that Lee was trying to meet his second wife's wishes as far as possible.

It was also suggested by counsel for the

defendants that Lee severed all relations with the plaintiff towards the end of 1958; and that such severance about a year after the marriage indicated that there was no intention on the part of Lee to form a permanent union with the plaintiff as husband and secondary wife. I found that Lee did not sever all relations with the plaintiff towards the end of 1958 or even after her visit to Lee's biscuit factory in March, 1959. After seeing Lee at the Southern Restaurant in March, 1959, she saw him there on two subsequent occasions. Lee continued to pay her maintenance. In the 8th moon, 1959, (that is 3rd September to 1st October) she saw Lee at his request at 140-D Ford Avenue. He told her that he found it difficult to come out as he was being shadowed by his second wife all the time. She had sexual relations with him there on that and subsequent occasions. She saw Lee for the last time in the first moon, 1960, (that is 28th January to 26th February). Sze Koh brought her maintenance in October, 1959. After that Kow Kia did so, the last occasion being the 2nd moon, 1960, (that is, 27th February to 26th March).

It was finally suggested by counsel for the defendants that the fact that the plaintiff took a long time to put forward her claim to be one of the lawful widows of Lee indicated that she was not really a secondary wife of his. In view of the evidence to the contrary I was unable to accept counsel's suggestion.

The third question I had to consider was a question of law: whether a Chinese secondary marriage could be dissolved by the unilateral repudiation of the secondary wife by the husband. Counsel for the defendants contended that a Chinese husband can discard his secondary wife at will. The authority he cited for this proposition was *Woon Ngee Yew* v. *Ng Yoon Thai*,[9] and he relied on the following passage from the judgment of Terrell J.A. at page 40:

> "The conception of the marriage found among the Chinese so far as concerns secondary wives or *t'sips* was something very different. In Imperial China a *t'sip* had practically no status. According to *Dyer Ball, Things Chinese*, page 213, she could be dismissed and left destitute. Her position was a little better if she had borne a son, as then apparently she could not be divorced without cause. These, however, are matters of mere historical interest, as the experts are agreed that in Malaya the position of a *t'sip* approximates more closely to that of a principal wife or *t'sai*. What, however, is quite clear is that divorce was at the will of the husband and still is so".

It must be pointed out that the learned judge does not stop there. He continues:

> "Among the Chinese resident in Malaya, however, such divorce must not be merely capricious but should be justified by such definite causes as desertion or misconduct".

I must also refer to *Re Sim Siew Guan, deceased*,[10] where Shaw C.J. accepted and acted upon the evidence given by the Consul-General of China as to Chinese custom: this was to the effect that divorce was at the will of the husband, who was entitled to divorce his secondary wife if she was disobedient to himself or his principal wife, if she did not conform to the household regulations, or was guilty of immoral conduct, and that the husband should notify the dissolution to his near relatives or his clansmen.

In my opinion, the law of Singapore is that a Chinese secondary marriage could be dissolved by the husband by unilaterally repudiating the secondary wife, if she has been disobedient to him or to his principal wife, or has been guilty of immoral conduct, and by notifying the dissolution to his near relatives or his clansmen.

The last question I had to decide was whether Lee divorced the plaintiff in accordance with Chinese custom. The defence adduced evidence as to the incident at the biscuit factory when Lee was angry with the plaintiff and her mother for coming to the factory. Lee Kim Yen, a salesgirl at the factory, said that the plaintiff's mother asked Lee why he did not go for such a long time and that Lee said "Forget about it. There is nothing else to talk about", and drove them out of the office. In the light of the evidence adduced by the plaintiff and particularly that given by Gan Siong Hiok, which is set out above and which I accepted, I did not regard Lee's words as an indication that he cast off the plaintiff on that or any earlier occasion. Counsel for the defendants invited the court to infer from the fact that the plaintiff did not attend the funeral that she knew that Lee had cast her off. The plaintiff's explanation for not attending the funeral was that she was very upset on hearing of Lee's death. It seemed to me probable also that she did not want to meet the second wife at the funeral because she was afraid that the second wife might start a row with her. In any event I accepted the plaintiff's evidence that she wore the mourning sign and ceased to wear red clothes after Lee's death; and that she went to the place where Lee was buried three months after the burial to perform certain rites. In view of the plaintiff's own evidence as to her meetings with Lee after the incident at the factory, which is set out above and which I accepted, I rejected the suggestion that the plaintiff knew that Lee had cast her off.

There was no evidence or even suggestion that the plaintiff had been disobedient to Lee or guilty of immoral conduct. The question of disobedience to Lee's principal wife did not arise as the plaintiff never lived in the principal wife's house and in fact was never introduced to her. I decided that Lee had no grounds for divorcing the plaintiff, that he did not divorce her, and

that he did not even cast her off as suggested by counsel for the defendants.

For the above reasons I came to the conclusion that the plaintiff is one of the lawful widows of Lee Gee Chong, deceased. And I ordered that paragraph 4 of the order of court dated the 20th February, 1961, be amended to read "That letters of administration of the estate of Lee Gee Chong, deceased, be granted to the said Tay Geok Yap and the said Lee Boon Leong and to Tan Lian Cheow".

From the above judgment the defendants appealed to the Federal Court.

Wee Chong Jin C.J. (Singapore): This is an appeal from the judgment of Ambrose J. of the High Court in Singapore. The learned trial judge held that the respondent Tan Lian Cheow was a secondary wife and accordingly a lawful widow of Lee Gee Chong deceased. Against this decision the appellants, to whom letters of administration of the estate of the deceased have been granted, now appeal.

Lee Gee Chong, the deceased, died intestate on or about the 25th April 1960. He was a Chinese domiciled in Singapore. After his death, his principal wife Tay Geok Yap one of the appellants, filed a petition for letters of administration of his estate on the 17th May 1960. Against this petition a caveat was filed by Ng Yin Yeok another appellant claiming an interest in the estate as a lawful widow of the deceased and as lawful guardian of her three children by him. By a deed of agreement dated 13th February 1961 the High Court ordered that the deed of agreement be approved and that letters of administration be granted to Tay Geok Yap and Lee Boon Leong, the deceased's son by her.

On 13th October 1961 the respondent claiming to be one of the lawful widows of the deceased moved the High Court to revoke the grant of letters of administration and as a result of this application the matter proceeded as an action between the respondent as plaintiff and the appellants as defendants and was heard by Ambrose J. who held that the respondent was a secondary wife of the deceased. The trial judge found on the evidence before him that the deceased and the respondent intended to form a permanent union as husband and secondary wife and that they formed the union in accordance with their intention on the 19th December 1957. Having found these facts on the evidence he came to the conclusion that the respondent had successfully proved that she was according to the law in Singapore a secondary wife of the deceased. The trial judge's view of the law is set out in this passage in his judgment:—

> "On the authorities cited by counsel for the plaintiff, the conclusion I came to as regards the question what had to be proved to prove a Chinese secondary marriage was this: it is only necessary to prove (1) a common intention to form a permanent union as husband and secondary wife and (2) the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband."

The authorities cited by counsel for the plaintiff and accepted by Ambrose J. are *Re Yeow Kian Kee deceased, Er Gek Cheng* v. *Ho Ying Seng* [6] and Re *Lee Siew Kow, deceased.*[7]

In *Er Gek Cheng* v. *Ho Ying Seng, supra* the issue before the then Chief Justice of Singapore was whether the plaintiff Er Gek Cheng was a secondary wife or *t'sip* of Yeow Kian Kee deceased. In his judgment, before dealing with the evidence before him he dealt with the law applicable to the matter before him.

At page 172 he said:—

> "The legal requirements for marriage with a *t'sai* and a *t'sip* are, I think, the same. This means that the law of this Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage. It is no longer any part of that conception that such a relationship must be life-long. It merely means one of indefinite duration as distinct from one for a definite period as is allowed among Moslems."

Again at page 173 he said:—

> "In the case of Chinese marriages, in most cases, the ceremonies regarded as essential at the time of the *Six Widows Case* [8] have disappeared and there remains a simple form of consensual marriage, quite in conformity with the requirements of the Canon Law.
>
> Therefore, if we adopt this conception we have a rational doctrine which can be applied in all cases which have not been especially provided for by statute.
>
> With these simple legal requirements the difficulties that have troubled the courts have been merely questions of evidence. The burden of proof is upon whoever alleges the status of *t'sip* to have existed. What must be proved in order to discharge that burden? In most cases there is some sort of a ceremony, and there is recognition of the *t'sip* as a member of the husband's family. But this is evidentiary only. It is not essential to the acquisition of the statue of *t'sip*. A formal contract in writing would be conclusive. If the parties were to live as such publicly so as to acquire the reputation of being man and *t'sip* that would also be evidence that the status had been acquired. On the other hand. I do not consider that mere cohabitation for a considerable period would by itself be sufficient evidence."

Lastly after reviewing the evidence he said at page 174:—

> "After considerable hesitation I come to the conclusion that the plaintiff had acquired the status of a *t'sip*, as it has been declared by courts composed of lawyers versed in English ideas. This conception is now part of the law of the Colony. It is now too late to reopen what has been decided in the *Six Widows Case* and subsequently and to reduce the matter to one of Chinese custom".

I have set out at length parts of the judgment of Murray-Aynsley C.J. to show that in my view, although he has not expressly referred to

the many earlier cases on the question in issue, he has considered them and to show that in his opinion for a woman to acquire the status of a secondary wife, the law of Singapore merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage.

In *Lee Siew Kow's* case, *supra,* the Singapore Court of Appeal was comprised of Murray-Aynsley C.J. (Singapore), Mathew C.J. (Federation of Malaya) and Brown J. Mathew C.J. and Brown J. both expressly approved the decision of Murray-Aynsley C.J. in *Er Gek Cheng* v. *Ho Ying Seng, supra.* Mathew C.J. at page 185 said:—

"In his judgment in *Er Gek Cheng* v. *Ho Ying Seng,* the learned Chief Justice has set out with great clarity the law of the Colony on the subject of the acquisition of the status of a *t'sip* or secondary wife, and has removed certain obscurities which clouded earlier decisions. He has laid down that for the legal requirements of a marriage with a *t'sip* the law of the Colony merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *t'sip.* With this exposition of the law I am in complete agreement.'

Brown J. at page 186 said:—

"I can see nothing in that decision which is at variance with the later decision in *Er Gek Cheng* v. *Ho Ying Seng.* And I think that upon the authorities the law can now be regarded as settled that in order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case".

Before us it was argued that Ambrose J. was wrong in law with regard to what must be proved to establish a Chinese secondary marriage. It was urged that upon all the relevant authorities beginning from the judgment of Sir Peter Maxwell when he was Recorder of Penang in the case of *Reg.* v. *Willans* [11] in 1859 down to the present day it was necessary to prove not only (1) a common intention to form a permanent union as husband and secondary wife and (2) the formation of the union by each taking the other as husband or secondary wife as the case may be but also (3) that the taking of the woman as secondary wife must be in accordance with proved Chinese customs.

At this stage it would be convenient to deal with a point raised during the course of the argument namely whether the decision in the *Lee Siew Kow* case, *supra,* is binding on this court. Counsel for the appellants has conceded, and in my view rightly so, that by virtue of section 88(3) of the Malaysia Act the Federal Court must be regarded as being one and the same court as the former Singapore Court of Appeal and that the decision in the *Lee Siew Kow* case is binding on this court unless, applying the principles laid down in *Young* v. *Bristol Aeroplane Co., Ltd.* [12] it can be shown that (1) the decision, though not expressly overruled, cannot, in the opinion of this court, stand with a decision of the Privy Counsel or (2) the decision was given *per incuriam* in that it acted in ignorance of a decision of the Privy Council which would have affected its decision had its attention been so drawn.

As regards the second principle counsel for the appellants urged upon us that two decisions of the Privy Council, which would have affected the decision of the Singapore Court of Appeal, were not brought to its attention in the *Lee Siew Kow* case. The two Privy Council cases are *Cheang Thye Phin* v. *Tan Ah Loy* [1] and *Khoo Hooi Leong* v. *Khoo Chong Yeok.* [13] The arguments of counsel are not reported in the only law report in which this case is reported and though it is correct to say that none of the three considered judgments refer to the two decisions of the Privy Council, it is in my view apparent from all the three judgments, all of which dealt with and considered the judgment of Terrell J. in *Re Lee Choon Guan deceased,* [2] in which he referred to both the Privy Council decisions, that not only was their attention drawn to both decisions but they must have considered these two authorities in the light of the point raised before them.

As regards the first principle the contention of counsel for the appellants is that the decision in *Lee Siew Kow's* case cannot stand with the decision in the case of *Khoo Hooi Leong* v. *Khoo Chong Yeok, supra.*

In *Khoo Hooi Leong* v. *Khoo Chong Yeok, supra,* the registrar certified, as the result of an inquiry before him as to whether one Khoo Hun Tee was a legitimate son of one Khoo Thean Tek, that Khoo Hun Tee was a legitimate son. On appeal Sproule J. reversed that finding and the appellate court affirmed the decision of Sproule J. The Privy Council upheld the decision of the appellate court.

The relevant facts in that case briefly were as follows:—

Khoo Thean Tek was a Chinese domiciled in Penang who had in addition to a principal wife one or more secondary wives. During some period of time he formed some kind of association with a woman named Petronella, who as a result of this association gave birth to Khoo Hun Tee on 22nd January 1854. Petronella was an Eurasian the daughter of Felix Baptist and from birth till death was a Roman Catholic by religion. On 19th April 1847 she was married at a Catholic Church to Richard Gaudoin. On 13th March 1857 Khoo Hun Tee was baptised at a Catholic Church, being described in the register

as "Edward Baptist, illegitimate son of Petronella Baptist about 4 years old". It is common ground that Khoo Thean Tek was the father of Khoo Hun Tee. In 1861 Petronella was married in Church to one Henry Cornelius and in the marriage register she is described as widow of Richard Gaudoin. Nothing is known as to where or when Richard Gaudoin died.

The registrar found that Petronella was a lawful secondary wife of Khoo Thean Tek and that therefore Khoo Hun Tee was a legitimate son. He also found that even if Petronella was not a lawful secondary wife, yet Khoo Hun Tee had been legitimate by subsequent recognition. The Privy Council held that even if (contrary to the usual presumption) it were assumed that at the time when Khoo Hun Tee was conceived Richard Gaudoin was in fact dead, so that Petronella was soluta or free to marry, nevertheless the evidence establishes nothing that is inconsistent but much that is only consistent with the view that the association between Petronella and the settler was merely of a temporary or casual character and that there was no evidence that the parties intended their union to be permanent in its nature so that upon the evidence it was impossible to find that Petronella was a lawful secondary wife of Khoo Thean Tek.

The Privy Council also held as regards legitimation by subsequent recognition that, although it was rightly conceded that the evidence of recognition would be sufficient to establish legitimation by subsequent recognition under Chinese custom, this custom was not part of the law operative in the Colony on the ground that no hardship much less injustice or oppression need result from a refusal to admit a modification of the English law in its application to the Chinese here so as to treat an illegitimate natural son as legitimated by subsequent recognition. Lord Russell of Killowen who delivered the judgment of the Board said (pages 355-6):—

> "Sproule J. (and Stevens J. in the appellate court) held that the Chinese custom of legitimation of a natural son by subsequent recognition was not part of the law operative in the Colony. Their Lordships agree with that view.
>
> The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell C.J. in *Choa Choon Neo* v. *Spottiswoode* 1 Kyshe, 216; and this Board, in *Yeap Cheah Neo* v. *Ong Cheng Neo* L.R. 6 P.C. 381, 396, stated that in Sir Peter Maxwell's judgment 'the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony are correctly stated.'
>
> From the above mentioned necessity arises the recognition by the courts of the Colony of polygamous marriages among the Chinese, and, as a logical consequence, the recognition of the legitimacy of the offspring (whether male or female) of such marriages.
>
> Their Lordships, however, are unable to find any grounds which would justify such a modification of English law as to treat an illegitimate natural son as legitimated by the mere fact of subsequent recognition. Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English law in its application to Chinese."

This judgment clearly lays down that the true principle upon which our courts have for almost a century consistently recognised the custom among the Chinese here of polygamous marriages is to prevent the injustice or oppression which would result from a failure to do so.

Counsel for the appellants contended before us that from the above principle it follows that a woman who claims to be a lawful secondary wife of a Chinese must *inter alia* prove that the marriage was performed or celebrated in accordance with the customs and rites of the Chinese inhabitants here because unless so celebrated, to refuse to recognise such a marriage would cause no injustice or oppression. This contention I am unable to accept.

It seems to me on the issue of whether Petronella had been in fact a secondary wife of Khoo Thean Tek, the Privy Counsel found that the evidence did not justify any such finding and if any principles can be extracted from the judgment of the Board it seems to me they are first, that the parties to such a union must intend their union to be permanent in its nature and secondly, that no form of marriage ceremony is necessary for creating the position or status of a secondary wife. This second principle accords with the decision of the Privy Council in *Cheang Thye Phin* v. *Tan Ah Loy* [1] where Lord Finlay who delivered the judgment of the Board said:—

> "There is nothing in the *Six Widows' Case* justifying the proposition that the court decided that a ceremony was essential".

Later on in dealing with the evidence as to whether there was in fact a ceremony Lord Finlay said:—

> "The learned registrar....finds there was no ceremony.... All the judges of the Court of Appeal held that a ceremony though usual was not essential to constitute a secondary wife. The view taken by them on this point is entirely consistent with the *Six Widows' Case*....".

It seems to me to follow that if no form of ceremony is necessary to create the status of a secondary wife, the proposition put forward that the law requires proof that the marriage was performed or celebrated in accordance with Chinese customs and rites cannot stand.

Apart from the doctrine of precedent, I am

in entire agreement with the passages in the judgments of Murray-Aynsley C.J. in the case of *Er Gek Cheng* v. *Ho Ying Seng* [6] and of Mathew C.J. in the *Lee Siew Kow* case which I have earlier set out and it follows in my opinion that the learned judge correctly sets out the law as regards what must be proved to establish a Chinese secondary marriage.

It may well be that the consequences which were held by our courts to follow when a woman successfully establishes that she has acquired that status may not have accorded with the consequences which follow in China when a woman acquires the status of a *'t'sip'* i.e. a secondary wife in China but those consequences flow from the fact that the law applicable here is the law of England modified only to the extent necessary to prevent injustice or oppression to the local inhabitants here and those consequences have obtained ever since our courts have held polygamous unions among the Chinese here are valid marriages.

With regard to the facts, it seems to me as the trial judge has correctly set out the law to be applied, that he was entitled to and indeed bound to find as he did, once he believed and accepted the evidence of the respondent, her mother and the deceased's uncle. Indeed at the trial, on the issue of whether there was a valid marriage as a secondary wife, the record discloses that the appellants led no evidence but relied entirely on their counsel's submission on the law.

Counsel for the appellants urged before us that the evidence does not justify the finding that the deceased intended to enter into a permanent union with the respondent. For the reasons set out in the judgment of Wylie C.J. which I have had the advantage of perusing, I am of the opinion that there was ample evidence to justify this finding.

For these reasons, I would dismiss this appeal with costs.

Wylie C.J. (Borneo): It is convenient to deal first with the questions of law raised in this appeal and this can be done without reference to the facts of the case.

The questions of law raised by the appellant were two:—

(1) That the trial judge wrongly interpreted the law in regard to what must be proved to establish a Chinese secondary marriage.

(2) That the Singapore Court of Appeal wrongly interpreted the law in their decision in *re Lee Siew Kow, deceased* [7] and that this court is not bound to follow that decision as it was given *per incuriam*.

As to whether this court is bound by that decision, counsel referred to *Young* v. *Bristol Aeroplane Co. Ltd.*,[12] *Moore* v. *Hewitt* [14] and *R.* v. *Northumberland and Compensation Appeal Tribunal*.[15] It was submitted that there had not been brought to the attention of the court in *Lee Siew Kow's case* [1] the decision of the Privy Council in *Cheang Thye Pin* v. *Tan Ah Loy* [1] and in *Khoo Hooi Leong* v. *Khoo Chong Yeok*.[13] This, it was said, follows from the fact that these two Privy Council judgments were not referred to in the judgments of the Court of Appeal. It has to be observed that the arguments of counsel are not reported and, therefore, it is not known from the report what authorities were brought to the attention of the court by counsel. However, one of counsel's arguments (it appears to involve the only question of law raised in that case) was that the decision in *Re Lee Choon Guan, deceased* [2] was erroneous, and all three judges refer to that judgment. That judgment in turn refers to both the Privy Council decisions. It is clear that the judgment in *Lee Choon Guan* must have been fully dealt with in argument and have been considered again by all three judges in considerable detail before giving their considered judgments. Judgment had been reserved. In those circumstances, it is not reasonable to assume that these decisions were not brought to the attention of the judges. A mere perusal of the judgment in *Lee Choon Guan* refers the reader to these authorities. Accordingly, in my judgment the general principle applies that a court is bound by its own decision, until that decision is upset by a court whose decisions are binding on the first court. It was conceded that, by virtue of section 88(3) of the Malaysia Act, the Federal Court must be regarded as in the same position as the Court of Appeal of Singapore in applying this principle to this decision. Accordingly, in my judgment, this court is bound by the decision in *Re Lee Siew Kow, deceased*.[7]

It is also to be noted that the state of the law has been the same for some fifteen years. In Singapore, where the population is some eighty per cent of Chinese origin, there must have been a considerable number of instances during those years where people have been guided by this state of the law in disposing of matters concerning Chinese secondary marriages, including some very important related matters such as the status of children and distribution of estates. See, for instance, In *Re Ho Khian Cheong, deceased*.[16] This is, in my judgment, an added reason for the conclusion that this court should feel itself bound by the decision in *Lee Siew Kow's* case.[1]

I should add that, although I have felt bound to follow this decision for the reasons I have given, I must not be understood to disagree with that decision. However, having regard to the reasons I have given, I do not consider it necessary to set out my views on this aspect, beyond

recording that I find nothing in the two Privy Council decisions that is inconsistent with the decision of the Court of Appeal. Indeed, in *Tan Ah Loy's* case [1] the Privy Council refers to the evidence in general as establishing that Tan Ah Loy was a secondary wife and nowhere is there any suggestion that any particular part of that evidence dealt with any feature that had of necessity to be established as a matter of Chinese custom or of law. In *Khoo Hooi Leong's* case [13] it was held merely that the evidence in general did not establish that relationship. There is no suggestion that this was because some particular, and essential, feature had not been established, except for the comment that the intention established appeared to be an intention to enter into a relationship that was temporary only, and not of a permanent nature. This comment tends to support, rather than conflict with, the judgments of the Chief Justice and Court of Appeal of Singapore as to what is required.

Of course, this court is not bound by previous decisions on questions of fact. And the question whether a certain usage exists is a question of fact, although the court will not require evidence to be called after the usage has been recognised by the courts to a sufficient extent. It is also open to the parties to call evidence that the usage is now different from what was established in earlier cases. That course was not followed by either party in the present case.

In my judgment, this course is no longer open in regard to contracting a Chinese secondary marriage in Singapore. The decision in *Lee Siew Kow's case* [7] confirmed an earlier decision by the Chief Justice of Singapore in *Er Gek Cheng* v. *Ho Ying Seng*,[6] and, in the latter case, the Chief Justice made it clear that he was making a decision as to what was now part of the law of Singapore. At page 172 he said:—

> "The legal requirements for marriage with a *t'sai* and a *t'sip* are, I think, the same. This means that the law of this Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage. It is no longer any part of that conception that such a relationship must be life-long. It merely means one of indefinite duration as distinct from one for a definite period, as is allowed among Moslems."

And again, in his conclusion after reviewing the evidence, he sums up at page 174 in these words:—

> "After considerable hesitation I come to the conclusion that the plaintiff had acquired the status of a *t'sip*: as it has been declared by courts composed of lawyers versed in English ideas. This conception is now part of the law of the Colony. It is now too late to reopen what has been decided in the *Six Widows Case* and subsequently and to reduce the matter to one of Chinese custom."

There are other passages in his judgment which show that he considers the matter to be one of law and no longer merely a question of Chinese custom.

In *Lee Siew Kow's* case, the remaining two members of the court expressly affirmed their approval of this earlier decision as to the law by the Chief Justice of Singapore, who was the third member of the court. Mathew C.J. says at page 185:—

> "He (i.e. the Chief Justice of Singapore) has laid down that for the legal requirements of a marriage with a *t'sip* the law of the Colony merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *t'sip*. With this exposition of the law I am in complete agreement."

And *per* Brown J. at page 186 after referring to the earlier decision:—

> "And I think that upon the authorities the law can now be regarded as settled that in order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case."

The headnotes to these two cases correctly record what was stated in the judgments as to the law of Singapore. In my judgment, therefore, this aspect of the subject — that is, what must be proved to establish a Chinese secondary marriage — is no longer a question of usage. However, even if it still is, it was for the appellant to show by evidence that the usage had changed since those decisions and, as I have said, this course was not followed.

As to whether the trial judge wrongly interpreted the law, counsel contended that the conclusion arrived at by the learned judge on the law was erroneous. That conclusion was as follows:—

> "On the authorities cited by counsel for the plaintiff, the conclusion I came to as regards the question what had to be proved to prove a Chinese secondary marriage was this: it is only necessary to prove (1) a common intention to form a permanent union as husband and secondary wife and (2) the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband."

This conclusion is arrived at after a review of *Er Gek Cheng's case* [6] and *Lee Siew Kow's* case [7] and after reviewing the decision in *Lee Choon Guan* [2] and deciding that it is not essential to prove long cohabitation and reputation of marriage in order to establish a Chinese secondary marriage.

The argument that this conclusion was wrong was really based in turn on the contention that the decisions in *Er Gek Cheng's* case and *Lee Siew Kow's* case were erroneous. I have already given my reasons why I feel bound to follow the latter decision and there is thus

nothing more to be said on the questions of law raised.

As to the facts, it was contended that there were several features of the evidence (as set out in the second ground of appeal) that the trial judge failed to consider or from which he failed to draw the proper inferences. A number of these points the judge clearly took into consideration and the others cannot, in my judgment, entitle a Court of Appeal on the facts of this case to reverse his decision on what is essentially a question of fact. It is necessary to bear in mind that the judge specifically states that he saw no reason to disbelieve the evidence of the plaintiff's mother and of Lim Joo Lim, the deceased's uncle. From that evidence he found, as he was clearly entitled to find, several most important facts bearing on deceased's intentions with regard to the relationship between himself and the respondent. These findings can be summarised as follows:—

(1) The deceased sent his uncle to respondent's mother to seek the mother's consent to his marrying the respondent.

(2) When deceased and the mother first met, it was marriage that was discussed.

(3) At a subsequent meeting between them dowry was discussed.

(4) Deceased co-operated in arrangements for, and actually paid for, a horoscope to find auspicious dates for betrothal and marriage.

(5) Deceased drafted a document which, on deceased's instructions, Lim caused to be typed and signed in duplicate by respondent, her mother and a witness. This document is clearly an acknowledgment that respondent was to be married to deceased as a secondary wife. Deceased kept one copy of this document and the respondent's mother the other copy.

(6) Deceased disclosed to his servant that the person who was coming to live in one of deceased's flats was his third wife.

(7) Later, when there was trouble between deceased and respondent, deceased told one of his close friends that he had married respondent.

While it is true that deceased never introduced respondent into his own family, there was ample in the evidence of deceased's uncle, his servant and his friend to support the respondent's explanation that this was because deceased wished to keep his third marriage secret from his first and second wives. Indeed, no other conclusion seems reasonable on all the evidence.

In my judgment, once the evidence of the respondent and her mother and deceased's uncle is accepted there can be no other conclusion but that these parties intended to enter into a Chinese secondary marriage and did in fact do so.

For these reasons, I would dismiss this appeal with costs.

Tan Ah Tah F.J.: This is an appeal from a judgment of Ambrose J. whereby it was held that the respondent was a secondary wife of Lee Gee Chong who died in April 1960 and that she is therefore now one of his lawful widows. In the course of his judgment the learned judge stated his view of the law on the issue before him in the following words:—

"On the authorities cited by counsel for the plaintiff, the conclusion I came to as regards the question what had to be proved to prove a Chinese secondary marriage was this: it is only necessary to prove (1) a common intention to form a permanent union as husband and secondary wife and (2) the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband."

The authorities relied upon by the learned judge were *Re Yeow Kian Kee, deceased, Er Gek Cheng* v. *Ho Ying Seng* [6] and *Re Lee Siew Kow, deceased.* [7]

The case of *Er Gek Cheng* v. *Ho Ying Seng, supra,* was heard in the High Court of Singapore before Murray-Aynsley C.J. who is the course of his judgment said, at page 172:—

"The legal requirements for marriage with a *t'sai* and a *t'sip* are, I think, the same. This means that the law of this Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage. It is no longer any part of that conception that such a relationship must be life-long. It merely means one of indefinite duration as distinct from one for a definite period as is allowed among Moslems."

At page 173 of the same report, there appears the following passage:—

"In the case of Chinese marriages, in most cases, the ceremonies regarded as essential at the time of the *Six Widows Case* have disappeared and there remains a simple form of consensual marriage, quite in conformity with the requirements of the Canon Law.

Therefore, if we adopt this conception we have a rational doctrine which can be applied in all cases which have not been especially provided for by statute.

With these simple legal requirements the difficulties that have troubled the courts have been merely questions of evidence. The burden of proof is upon whoever alleges the status of *t'sip* to have existed. What must be proved in order to discharge that burden? In most cases there is some sort of a ceremony, and there is recognition of the *t'sip* as a member of the husband's family. But this is evidentiary only. It is not essential to the acquisition of the status of *t'sip*. A formal contract in writing would be conclusive. If the parties were to live as such publicly so as to acquire the reputation of being man and *t'sip* that would also be evidence that the status had been acquired. On the other hand, I do not consider that mere cohabitation for a considerable period would by itself be sufficient evidence."

Re Lee Siew Kow deceased, supra, was heard by the Singapore Court of Appeal, the members of the court being Murray-Aynsley C.J. (Singapore), Mathews C.J. (Federation of Malaya) and Brown J. The case of *Er Gek Cheng* v. *Ho Ying Seng, supra* was referred to and the decision of Murray-Aynsley C.J. in that case was approved by Mathew C.J. and Brown J. Mathew C.J. said, at page 185:—

"In his judgment in *Er Gek Cheng* v. *Ho Ying Seng*, the learned Chief Justice has set out with great clarity the law of the Colony on the subject of the acquisition of the status of a *t'sip* or secondary wife, and has removed certain obscurities which clouded earlier decisions. He has laid down that for the legal requirements of a marriage with a *t'sip* the law of the Colony merely requires a consensual marriage and that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a *t'sip*. With this exposition of the law I am in complete agreement."

Brown J. said, at page 186:—

"I can see nothing in that decision which is at variance with the later decision in *Er Gek Cheng* v. *Ho Ying Seng*. And I think that upon the authorities the law can now be regarded as settled that in order to establish a claim to be a secondary wife a consensual marriage must be proved. The means by which the mutual consent to marry is to be proved is a matter of evidence in each case."

It was contended by counsel for the appellants that the principles relating to Chinese secondary marriages were not correctly stated in *Er Gek Cheng* v. *Ho Ying Seng, supra,* and *Re Lee Siew Kow, deceased, supra,* and that the learned trial judge, in relying upon those authorities, had accordingly taken an erroneous view of the law. This argument naturally gave rise to the question whether the decision in *Re Lee Siew Kow, deceased, supra,* which, as I have said, was heard by the Singapore Court of Appeal is binding on this court.

Counsel for the appellants conceded, and in my view properly conceded, that in considering this question, having regard to the provisions of section 88(3) of the Malaysia Act, 1963, the Singapore Court of Appeal must be regarded as being in effect one and the same court as this court.

However, counsel for the appellants went on to cite *Young* v. *Bristol Aeroplane Co., Ltd.*[12] and, in reliance on the principles enunciated in that case, submitted that this court should refuse to follow the decision in *Re Lee Siew Kow, deceased, supra,* for two reasons, the first being that the decision cannot stand with the decision of the Privy Council in the case of *Khoo Hooi Leong* v. *Khoo Chong Yeok*[13] and the second being that the decision in *Re Lee Siew Kow, deceased, supra,* was given *per incuriam.*

As to the first of these two reasons, it is to be observed that the decision in *Khoo Hooi Leong* v. *Khoo Chong Yeok, supra,* was given prior to and not subsequent to the decision in *Re Lee Siew Kow, deceased, supra.* In any event, the judgment of the Privy Council in *Khoo Hooi Leong* v. *Khoo Chong Yeok* shows that the Board were not so much concerned with a marriage ceremony or ceremonies as with other facts and circumstances which indicated whether or not the man Khoo Thean Tek and the woman Petronella intended their union to be permanent in its nature. I can find nothing in the judgment which is inconsistent with the decision in *Re Lee Siew Kow, deceased, supra.*

With regard to the second reason put forward by counsel for the appellants, this depends upon the fact that two decisions of the Privy Council, namely *Cheang Thye Phin* v. *Tan Ah Loy*[1] and *Khoo Hooi Leong* v. *Khoo Chong Yeok, supra,* were not referred to in any of the three judgments in *Re Lee Siew Kow, deceased, supra.* It should be noted, however, that each of the three judgments deals with the case of *Re Lee Choon Guan, deceased,*[2] which had been cited to the courts and must have been discussed during the hearing. The two Privy Council decisions are referred to in the judgment in *Re Lee Choon Guan, deceased, supra* and must have been brought to the attention of the three judges. In my opinion, it cannot be said that the decision in *Re Lee Siew Kow, deceased, supra,* was given *per incuriam.*

It follows from the foregoing that in my judgment this court is bound by the decision in *Lee Siew Kow, deceased, supra.* Indeed, I would go further and state that I agree with the principles relating to Chinese secondary marriages set out in the judgment of Mathew C.J. in that case and also with the judgment of Murray-Aynsley C.J. in *Er Gek Cheng* v. *Ho Ying Seng, supra.*

As to the law, therefore, the learned trial judge has in my opinion correctly stated the principles to be applied to the case. With regard to the facts, he has stated that he believed and accepted the evidence of the respondent, her mother and the deceased's uncle. In my opinion there was ample evidence on which he could reach the conclusion, which he did, that the respondent is one of the lawful widows of the deceased.

I would dismiss this appeal with costs.

Wee Chong Jin C.J. (Singapore) delivering oral judgment on the question of costs: On the question of costs we think on the authorities the position is clear. Unless it can be shown that there are exceptional circumstances for a trustee or trustees to seek a second opinion from the courts, where litigation is concerned, the unsuccessful appellant must pay the costs, that is to say, the usual consequences will follow from an unsuccessful appeal.

That being so the order which all three of us made in our judgments that the appeal is dismissed with costs will stand and that means, if it needs any clarification, that the appellants must pay the costs to be taxed between party and

party and that the unsuccessful trustees the first appellants in this case are not entitled to their costs out of the estate.

Appeal dismissed.

Solicitors: *Laycock & Ong; Allen & Gledhill.*

TAN KHENG KUAN v. LIM CHEN TEIK & ORS.

[O.C.J. (Hepworth J.) October 30, 1964]

[Penang — Civil Suit No. 253 of 1963]

Negligence — Crossing line of oncoming traffic — Special duty of care.

Damages — Personal injury — Brain injury — Loss of understanding and memory — Unsound mind and incapable of managing himself or his own affairs — Loss of amenities of life.

Road Traffic — Crossing line of oncoming traffic — Duty of care.

The plaintiff, a trishaw rider, was crossing a junction when there was a collision between a motor cycle driven by the second defendant and a motor car driven by the third defendant at about the centre of the junction. The result was that the second defendant lost control of his motor cycle which proceeded to collide with the plaintiff's trishaw overturning the trishaw and throwing the plaintiff to the ground. As a result the plaintiff suffered a fracture of the parietal bone on the right and a craniotomy carried out on the plaintiff's head showed that there was damage to the middle meningeal artery and there was laceration of the dura mater and brain tissue. The effect of the accident was that the plaintiff could not concentrate on what he was doing and was found to be of unsound mind and incapable of managing himself and his affairs.

Held: (1) the damage sustained by the plaintiff was solely due to the negligent driving of the motor car by the third defendant;

(2) in the circumstances the appropriate award under general damages should be $37,600 ($12,600 for loss of earnings and $25,000 for loss of amenities).

Observations on duty of driver in turning vehicle across the general route of traffic.

Cases referred to:—

(1) *Liow Sang* v. *Chai Choo Kin & Anor.* [1962] M.L.J. 429.

(2) *Jenkins* v. *Greenwood* (1953) 1 Kemp & Kemp, 2nd ed. 200.

(3) *Bird* v. *Cocking & Sons Ltd.* [1951] 2 T.L.R. 1260.

CIVIL SUIT.

Lim Swee Gaik (Miss) for the plaintiff.

Wong Sai Heng for the 1st and 2nd defendants.

Yeap Ghim Guan for 3rd defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiff, Tan Kheng Kuan, who resides at 68-C, Bagan Jermal, Penang, sues *in forma pauperis* by his committee, Lim Eng Tin, and was a trishaw rider until January, 1962.

The first defendant, who lives at No. 80, Jahudi Road, Penang, defends by his guardian *ad litem*, Wah Seng Jong, and was at all material times the owner of Honda motor-cycle registered No. PC.579. The second defendant, who lives at No. 34, Green Hill Drive, Fettes Park, Penang, defends by his guardian *ad litem*, Yee Hon Him, and was at all material times the rider of motor-cycle PC.579. The third defendant lives at No. 45, Burmah Road, Penang, and was at all material times the owner of Fiat motor-car registered No. P.755.

On the 20th January, 1962, at about 11 p.m. the second defendant was riding motor-cycle PC.579 along Kelawei Road in the direction of the junction of Bagan Jermal Road, Tanjong Tokong Road and Kelawei Road with the first defendant on the pillion. On the same day and at the same time the third defendant was driving motor-car P.755 in the opposite direction along Tanjong Tokong Road towards the said junction. On the same day and at the same time the plaintiff was riding his trishaw along Kelawei Road in the direction of the said junction, that is to say in the same direction as motor-cycle PC.579 ridden by the second defendant, having as passengers in the trishaw his wife (P.W.2) and son.

At a time when the plaintiff, riding his trishaw, had almost completed crossing the said junction and reaching Tanjong Tokong Road, there was a collision between motor-cycle PC. 579 ridden by the second defendant and motor-car P.755 driven by the third defendant at a point approximately at the centre of the said junction. The result was that the second defendant lost control of motor-cycle PC.579 which proceeded to collide with the plaintiff's trishaw overturning the trishaw and throwing the plaintiff and his wife and son to the ground. As a result the plaintiff sustained severe injuries to his head.

The plaintiff claims that the injuries sustained by him were the result of the negligent driving of motor-cycle PC.579 by the second defendant as the servant or agent of the first defendant and/or the negligent driving of motor-car P.755 by the first defendant, and claims damages.

The first and second defendants plead that the collision was caused or contributed to by the negligent driving of the third defendant and the third defendant pleads that the collision was caused or contributed to by the negligent driving of the second defendant and/or by the negligence of the plaintiff. At the hearing the third defendant abandoned his allegation of negligence on the part of the plaintiff and confined himself to